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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/797,442	03/10/2004	Theodore M. Wong	SP-1270	4494
44388	7590	09/26/2005	EXAMINER	
SOLAE, LLC P. O. BOX 88940 ST. LOUIS, MO 63188			WEIER, ANTHONY J	
			ART UNIT	PAPER NUMBER
			1761	

DATE MAILED: 09/26/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/797,442

Applicant(s)

WONG ET AL.

Examiner

Anthony Weier

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-48 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-48 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date ____. | 6) <input type="checkbox"/> Other: ____.  |

## DETAILED ACTION

### *Claim Rejections - 35 USC § 102*

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

2. Claims 1-48 are rejected under 35 U.S.C. 102(e) as being anticipated by Shen (U.S. Patent Application Publication No. 2004/0258827) ~~or Huang~~.

Shen discloses an acid beverage product comprising a hydrated protein stabilizing agent (e.g. pectin; about 0.5% in final beverage, see Example A; also jellan gum, paragraph 41), a hydrated protein material (e.g. hydrolyzed soy protein isolate; list of commercial products, paragraph 30; about 3% in the final beverage, see Example A) and an acid (e.g. ascorbic acid) wherein the beverage has a pH of, for example, 3.8 (see also paragraphs 28, 34, and 38-43) and the particular ratio of soy protein isolate to protein stabilizing agent (about 1: 0.166 using above percentages).

It is expected that one or more of the protein isolate products set forth in paragraph 30 of Shen have a removed or reduced phytate content as called for in the instant claims. It is requested that Applicants submit evidence to corroborate the presumed reduced phytic content in these commercial products, particularly since it

Art Unit: 1761

appears that these commercial products are the property of or have been the property to the assignee of the current application.

3. Claims 1-11, 15-27, 31-43, 47, and 48 are rejected under 35 U.S.C. 102(e) as being anticipated by Huang (U.S. Patent No. 6887508).

Huang discloses an acid beverage product comprising a hydrated protein stabilizing agent (e.g. pectin; about 0.2% in final beverage, e.g. col. 15, lines 9-18), a hydrated protein material (e.g. hydrolyzed soy protein isolate; about 1.56% in the final beverage, e.g. col. 15, lines 9-18) and an acid (e.g. citric acid) wherein the beverage has a pH of, for example, 3.85 (see Examples) and the particular ratio of soy protein isolate to protein stabilizing agent (about 1: 0.12 using above percentages).

It is expected that Surpo Plus 675 set forth in col. 15 of Huang has a removed or reduced phytate content as called for in the instant claims. It is requested that Applicants submit evidence to corroborate the presumed reduced phytic content in these commercial products, particularly since it appears that these commercial products are the property of or have been the property to the assignee of the current application.

### ***Claim Rejections - 35 USC § 103***

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Art Unit: 1761

5. Claims 1-48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Shen (U.S. Patent Application Publication No. 2004/0258827) taken together with EP 380343.

Shen has been discussed above. If it is shown that less than all or none of the commercial soy isolate products referred to in paragraph 30 possess a phytate content as called for in the instant claims, the following should be noted. EP 380343 teaches the removal of phytate from soy protein isolates to, in part, provide a protein source that is a better nutritional quality as phytic acids interferes with the assimilation in humans of various metals that may lead to deficiency disorders and also inhibits various enzymes such as pepsin and trypsin in the gastrointestinal tract thus decreasing the digestibility of soy protein (page 1). It would have been obvious to one having ordinary skill in the art at the time of the invention to have employed such phytate-free soy protein isolate in the composition of Shen for such reasons.

6. Claims 1-11, 15-27, 31-43, 47, and 48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Huang (U.S. Patent No. 6887508) taken together with EP 380343.

Huang has been discussed above. If it is shown that less than all or none of the commercial soy isolate products referred to in paragraph 30 possess a phytate content as called for in the instant claims, the following should be noted. EP 380343 teaches the removal of phytate from soy protein isolates to, in part, provide a protein source that is a better nutritional quality as phytic acids interferes with the assimilation in humans of various metals that may lead to deficiency disorders and also inhibits various enzymes

Art Unit: 1761

such as pepsin and trypsin in the gastrointestinal tract thus decreasing the digestibility of soy protein (page 1). It would have been obvious to one having ordinary skill in the art at the time of the invention to have employed such phytate-free soy protein isolate in the composition of Huang for such reasons.

7. Claims 1-48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Patel et al taken together with EP 380343.

Patel et al discloses an acid beverage product comprising a hydrated protein stabilizing agent (e.g. gum Arabic or pectin, about 0.3% in final beverage, e.g. col. 12, lines 39-46; claims), a hydrated protein material (e.g. hydrolyzed soy protein isolate; about 5% in the final beverage, see Examples) and an acid (e.g. ascorbic acid) wherein the beverage has a pH of 4, for example (see Examples) and the particular ratio of soy protein isolate to protein stabilizing agent (about 1: 0.06 using above percentages).

The claims further call for the particular phytate content of the soy protein isolate. EP 380343 teaches the removal of phytate from soy protein isolates to, in part, provide a protein source that is a better nutritional quality as phytic acids interferes with the assimilation in humans of various metals that may lead to deficiency disorders and also inhibits various enzymes such as pepsin and trypsin in the gastrointestinal tract thus decreasing the digestibility of soy protein (page 1). It would have been obvious to one having ordinary skill in the art at the time of the invention to have employed such phytate-free soy protein isolate in the composition of Patel et al for such reasons.

The claims further call for the use of jellan gum. Although Patel et al appears to be silent concerning same, such polysaccharide hydrolyzate is well known, and, absent

Art Unit: 1761

a showing of unexpected results, it would have been further obvious to have employed same as a matter of preference among gums in general depending on, for example, cost or availability.

6. Claims 1-11, 15-27, 31-43, 47, and 48 are rejected under 35 U.S.C. 103(a) as being unpatentable over EP 1338210 taken together with EP 380343.

EP 1338210 discloses an acid beverage product comprising a hydrated protein stabilizing agent (e.g. pectin; about 0.2% in final beverage, Example 9), a hydrated protein material (e.g. hydrolyzed soy protein isolate; about 1.56% in the final beverage, e.g. Example 9) and an acid (e.g. citric acid) wherein the beverage has a pH of, for example, 3.85 (see Examples) and the particular ratio of soy protein isolate to protein stabilizing agent (about 1: 0.12 using above percentages).

The claims further call for the particular phytate content of the soy protein isolate. EP 380343 teaches the removal of phytate from soy protein isolates to, in part, provide a protein source that is a better nutritional quality as phytic acids interferes with the assimilation in humans of various metals that may lead to deficiency disorders and also inhibits various enzymes such as pepsin and trypsin in the gastrointestinal tract thus decreasing the digestibility of soy protein (page 1). It would have been obvious to one having ordinary skill in the art at the time of the invention to have employed such phytate-free soy protein isolate in the composition of EP 1338210 for such reasons.

### ***Double Patenting***

7. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11

Art Unit: 1761

F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-48 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-16 of copending Application No. 10/825528 in view of EP 380343.

The claims further call for the particular phytate content of the soy protein isolate. EP 380343 teaches the removal of phytate from soy protein isolates to, in part, provide a protein source that is a better nutritional quality as phytic acids interferes with the assimilation in humans of various metals that may lead to deficiency disorders and also inhibits various enzymes such as pepsin and trypsin in the gastrointestinal tract thus decreasing the digestibility of soy protein (page 1). It would have been obvious to one having ordinary skill in the art at the time of the invention to have employed such phytate-free soy protein isolate in the composition of EP 1338210 for such reasons.

This is a provisional obviousness-type double patenting rejection.

### **Conclusion**

8. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

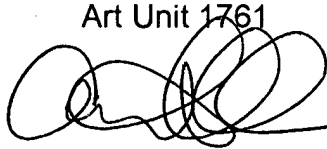
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Anthony Weier whose telephone number is 571-272-1409. The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Anthony Weier

Anthony Weier  
Primary Examiner  
Art Unit 1761



9/22/05

Application/Control Number: 10/797,442

Page 9

Art Unit: 1761

September 22, 2005